APPENDIX A

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.

The Atchison, Topeka and Santa Fe Railway Company.

Gulf, Colorado and Santa Fe Railway Company.

Panhandle and Santa Fe Railway Company.

Chicago, Rock Island and Pacific Railroad Company.

The Colorado and Southern Railway Company.

Fort Worth and Denver City Railway Company.

Illinois Central Railroad Company.

The Kansas City Southern Railway Company.

Louisiana & Arkansas Railway Company.

The Arkansas Western Railway Company.

Fort Smith and Van Buren Railway Company.

Midland Valley Railroad Company.

Kansas, Oklahoma & Gulf Railway Company.

Oklahoma City-Ada-Atoka Railway Company.

Missouri-Kansas-Texas Railroad Company.

Missouri-Kansas-Texas Railroad Company of Texas.

Beaver, Meade and Englewood Railroad Company.

Missouri Pacific Railroad Company.

St. Louis Southwestern Railway Company.

St. Louis-San Francisco Railway Company.

St. Louis, San Francisco and Texas Railway Company.

Quanah, Acme & Pacific Railway Company.

Southern Pacific Company.

Texas and New Orleans Railroad Company.

The Texas and Pacific Railway Company.

Abilene & Southern Railway Company.

The Denison and Pacific Suburban Railway Company.

Texas-New Mexico Railway Company.

Texas Short Line Railway Company.

The Weatherford, Mineral Wells and Northwestern Railway Co.

The Texas Mexican Railway Company.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Before BROWN, Circuit Judge, ATWELL and ESTES, District Judges, BROWN, Circuit Judge:

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Commerce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

[1]The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential

in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the complainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules, the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July, 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U. S. C. A. 15(7), for

[2]After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the effect of which is to freeze the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference

[3]Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

hearing September 21, 1955, the Suspension Board[4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order[5] states:

> "*And it further appearing*, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:"

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2

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[4]A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U. S. C. A. 17(2), §7.3, 20 FR 5031-5035, July 14, 1955.

[5]Investigation and suspension docket No. 6476 Carbon Black—Southwest to U. S. A. & Canada.

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:"

(Railroad tariffs are described)

(then follows paragraph quoted in text above)

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

vacated[6] its prior order of suspension. The only "finding" by the Commission[7] was:

> "*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:"

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the grant-

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[6]"*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rate and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

[7]By order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8]While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

ing or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are powerless to suspend the rail schedules which have thus become effective or reinstate the prior rates.

As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

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[9]The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to complain of Commission action, Alton R. Co. v. United States, 315 U. S. 15, 86 L. Ed. 586; Chicago St. P. M. & O. Ry. Co. v. United States (D. C. Minn.), 50 Fed. Supp. 249, affd. 322 U. S. 1, 88 L. Ed. 1093; cf. F. C. C. v. Sanders Brothers Radio Station, 309 U. S. 470, 84 L. Ed. 869; Interstate Com. Com. v. Oregon-Wash. R. Co., 288 U. S. 14, 25, 77 L. Ed. 588, 596; American President Lines v. Federal Maritime Board (D. C. D. C.), 112 Fed. Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law," 1009(e), Administrative Procedure Act, 5 U. S. C. A. 1001 et seq., it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counteraffidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judgment, at this time, upon the intrinsic merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower, inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they (rates) would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the * * * act and constitute unfair and destructive competitive practices in

[10]The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: Carlsen v. United States (S. D. N. Y.) (three-Judge), 107 Fed. Supp. 398; Algoma Coal & Coke Company, et al. v. United States (D. C. Va., 1935) (three-Judge), 11 Fed. Supp. 487; M. C. Kiser Co. v. Central of Georgia Railway (D. C. Ga.), 236 Fed. 573, Affd. 5 Cir., 239 Fed. 718; Manhattan Transit Co., Inc. v. United States (D. C. Mass.) (three-Judge), 24 Fed. Supp. 174; National Water Carriers Association v. United States (S. D. N. Y.) (three-Judge), 126 Fed. Supp. 87; Merchants Truckmen's Bureau v. United States (S. D. N. Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, Ferguson-Steere Motor Co. v. United States (N. D. Tex. 1954) (three-Judge), 126 Fed. Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual[11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through specific citation in the briefs before us, to accord to Commission action a presumption of legality, United States v. Chemical Foundation, 272 U. S. 1, 14, 15; Baltimore and Ohio R. Co. v. United States, 293 U. S. 349, 358, 360; Federal Power Commission v. Hope National Gas Co., 320 U. S. 591, 602, we think that all parties were entitled to take this for its face value as a deliberate, responsible, articu-

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[11]The first is in 15(7) of the Interstate Commerce Act, 49 U. S. C. A. 15(7):

"Whenever there shall be filed with the commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfuless of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * *. At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." (Emphasis supplied.)

The second is in the Administrative Procedure Act 8, 49 U. S. C. A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." (Emphasis supplied.)

late finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor."[12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," S. E. C. v. Schenery Corp., 318 U. S. 80, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our

[12]The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents (railroads and some shippers) requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be a good ground; nor, as contended by Complainants, do we think that the Commission meant that.

system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the basic or essential findings required to support the Commission's order," State of Florida v. United States, 282 U. S. 194, 215, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U. S. 454, 465, 79 L. Ed. 587; Alabama G. S. R. Co. v. United States, 340 U. S. 216, 224, 95 L. Ed. 225; Cantlay & Tanzola v. United States (S. D. Calif.) (three-Judge), 115 Fed. Supp. 72; North Carolina v. United States, 325 U. S. 507, 89 L. Ed. 1760; Atlanta and St. Andrews Bay Railway Co. v. United States, 104 Fed. Supp. 193; Pacific Island Tariff Bureau v. United States, 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U. S. C. A. 1007(b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under Riss and Co., Inc. v. United States, 341 U. S. 907, 95 L. Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> "1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof."

Starting with Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co., 281 U. S. 412, which, describing the statutory background of present Section 15(7) concerning suspensions, states, "This power of suspension was entrusted to the Commission only," and relying heavily on *Carlsen*, *Algoma Coal*, *Kiser*, *Manhattan Transit Co.*, and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001(f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation in-

tended should be under, not exempt from, the Administrative Procedure Act.[13]

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we think it evident that the order of vacation did not satisfy these requirements. This order vacat-

[13]The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"Sec. 10. (now 1009) Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by theConstitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committe on the Judiciary, House of Representatives (House Report No. 1980), pages 275, 276:

"Section 10. * * * (heading same as Senate Committee Report).

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

(Footnote 13, continued on page 36.)

ing the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing" the prior action is rescinded. If it is read as though it were meant to be a repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as

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(Footnote 13 continued from page 35.)

"* * * (Here follows first paragraph of Senate Committee Report quoted above.) The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, pages 310, 311:

"MR. McCARRAN: I yield.

"MR. DONNELL: I should like to ask the distinguished Senator a question. Section 10 (now 5 U. S. C. A. 1009) of the bill recites in part that—

(Footnote 13 continued on page 37.)

a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to determine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hasty, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good

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(Footnote continued from page 36.)

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"MR. McCARRAN: Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"MR. DONNELL: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"MR. McCARRAN: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing," determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U. S. C. A. 13. But under the statutory scheme of Section 15(7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and

injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. Utah Fuel Company v. National Bituminous Coal Commission, 306 U. S. 56; Isbrandtsen Co. v. United States, 211 F. 2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, Standard v. Olsen, May 22, 1954, 98 L. Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections 6(3), 15(1) and 15(7) of the Act, 49 U. S. C. A.

[14]The provision in 15(7), footnote 11 supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

6(3), 15(1), 15(7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. Skinner and Eddy Corp. v. United States, 249 U. S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff[15] rates and schedules

[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

which became, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

JUDGMENT FOR PLAINTIFF. REMANDED TO THE COMMISSION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL.

v.

UNITED STATES OF AMERICA

JUDGMENT

BE IT REMEMBERED, that on December 12, 1955, in the above entitled and numbered cause wherein AMARILLO-BORGER EXPRESS, INC.; BEST MOTOR FREIGHT; KNAUS TRUCK LINE, INC.; LEEWAY MOTOR FREIGHT, INC.; MERCHANT'S FAST MOTOR LINES, INC.; STRICKLAND TRANSPORTATION COMPANY, INC.; SUNSET MOTOR LINES, INC.; and YELLOW TRANSIT FREIGHT LINES, INC., are Complainants; the UNITED STATES OF AMERICA is Defendant; and the Interstate Commerce Commission is intervener on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads whose names are listed in Appendix "A" of this judgment) are likewise intervenors

on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black-Southwest to U. S. A. & Canada. *It appearing*, That by an order dated September 28, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It is ordered*, That the said order of September 23, 1955, be,

> and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. Harold D. McCoy, Secretary. SEAL."

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111-J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955, (to the extent that they publish rates suspended by the order of September 23, 1955) be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension

Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

RENDERED AND ENTERED in open Court this 24th day of January, 1956.

/s/ WM. H. ATWELL
United States District Judge

APPROVED FOR ENTRY:

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Attorney for Complainants

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Attorney for United States of America

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Attorney for Interstate Commerce Commission

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Attorney for Southwestern Railroads

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APPENDIX C

ion 15(7) of the Interstate Commerce Act, as
ed, is quoted as follows:

"Whenever there shall be filed with the Commission
ny schedule stating a new individual or joint rate,
are, or charge, or any new individual or joint classi-
cation, or any new individual or joint regulation or
ractice affecting any rate, fare, or charge, the Com-
ission shall have, and it is hereby given, authority,
ther upon complaint or upon its own initiative with-
ut complaint, at once, and if it so orders without an-
ver or other formal pleading by the interested car-
er or carriers, but upon reasonable notice, to enter
pon a hearing concerning the lawfulness of such
ate, fare, charge, classification, regulation, or prac-
ce; and pending such hearing and the decision there-
n the Commission, upon filing with such schedule and
elivering to the carrier or carriers affected thereby
statement in writing of its reasons for such suspen-
on, may from time to time suspend the operation of
uch schedule and defer the use of such rate, fare,
harge, classification, regulation, or practice, but not
or a longer period than seven months beyond the time
hen it would otherwise go into effect; and after full
earing, whether completed before or after the rate,
are, charge, classification, regulation, or practice
oes into effect, the Commission may make such order
ith reference thereto as would be proper in a pro-
eeding initiated after it had become effective. If the
roceeding has not been concluded and an order made
ithin the period of suspension, the proposed change
f rate, fare, charge, classification, regulation, or
ractice shall go into effect at the end of such period;
ut in case of a proposed increased rate or charge for
r in respect to the transportation of property, the
ommission may by order require the interested car-
ier or carriers to keep accurate account in detail of

all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." [49 U. S. C., 15 (7), 44 Stat. 1447.]

Section 8 of the Administrative Procedure Act, is quoted as follows:

"In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES. — In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it

may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision, or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (5 U. S. C., 1007, 60 Stat. 237.)

Section 10 of the Administrative Procedure Act is quoted as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION. — The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS. — Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) INTERIM RELIEF. — Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may

be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (5 U. S. C., 1009, 60 Stat. 237.)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ____

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMARILLO-BORGER EXPRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court is reported in 138 F. Supp. 411. The court's opinion and its final judgment, as well as the Commission's unreported orders of September 23, 1955, and November 14, 1955, are set forth in Appendices A through D, *infra,* pages 19–45.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The judgment of the District Court was entered on January 24, 1956, and a motion for new trial was overruled on Febru-

ary 21, 1956. Notice of appeal was filed in that court by the United States and the Commission on April 19, 1956.[1] The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Board of Railroad Commissioners of North Dakota* v. *Great Northern Ry.,* 281 U. S. 412; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671; and *American Trucking Assns.* v. *United States,* 344 U. S. 298.

STATUTES INVOLVED

Sections 6 (3), 13 (1), and 15 (7) of the Interstate Commerce Act (49 U. S. C., Sections 6 (3), 13 (1) and 15 (7)), and Sections 8 (b) and 10 (e) of the Administrative Procedure Act (5 U. S. C., Sections 1007 (b) and 1009 (e)), are set forth in Appendix E, *infra,* pages 45–49.

QUESTIONS PRESENTED

Acting under Section 15 (7) of the Interstate Commerce Act, the Interstate Commerce Commission ordered the suspension of certain proposed rate schedules pending a hearing and decision on the lawfulness of such schedules. Subsequently, on recon-

[1] On June 12, 1956, District Judge Atwell granted an extension until July 2, 1956, for the filing of the Jurisdictional Statement by the United States of America and the Interstate Commerce Commission. Rule 13.1, Revised Rules.

sideration, the Commission vacated the suspension order. After the rate schedules had gone into effect, the District Court set them aside as "void ab initio" on the ground that the Commission's order vacating the suspension was unaccompanied by proper findings. The following questions are presented by this appeal:

1. Whether the Commission's order vacating the suspension is subject to judicial review.

2. Whether the Commission was required to make findings in support of its order vacating the suspension.

3. Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect but prior to a final decision on their lawfulness by the Commission.

STATEMENT

On or about August 12, 1955, pursuant to Section 6 (3) of the Interstate Commerce Act, Southwestern and Western trunk-line rail carriers filed with the Commission proposed schedules of reduced rates and charges on carbon black [2] to become effective September 24, 1955. Motor carrier rate bureaus and a motor carrier filed protests against the proposed rates and petitions for their suspension and investigation. Replies to the protests and petitions were filed by the proponents of the rates, including shippers of carbon black. The matter was referred to the Board of Sus-

[2] Carbon black, a byproduct of natural gas, is produced principally in Texas and other Southwestern states. Primary consumers of carbon black are tire manufacturers located in Ohio and other Northern states.

pension[3] of the Commission for initial action. On September 22, 1955, two days before the rates were to become effective, the Board voted not to suspend but to investigate the proposed new rates.[4]

The matter was immediately appealed to Division 2 of the Commission, acting as an appellate division, which entered an order on September 23, 1955 (Appendix C, *infra*, pp. 42–44), suspending the proposed rate schedules "to and including April 23, 1956, unless otherwise ordered by the Commission".

Thereafter, petitions for reconsideration were filed by the proponents of the rates, and replies thereto were filed by the protestants. By order entered November 14, 1955 (Appendix D, *infra*, pp. 44–45), the appellate division vacated the suspension as of November 24, 1955, but directed that the investigation continue. A stay of the November 14 order was denied by the entire Commission on November 23, 1955.

In the meantime, the Commission set the matter down for hearing and so notified the parties on November 1 and 16 and December 6, 1955. Hearings were held before an examiner on February 2 and 3, 1956, at Dallas, Texas.

The present action was commenced by appellees (a group of motor carriers engaged in part in the trans-

[3] The Board of Suspension consists of five employees of the Commission duly constituted as a board pursuant to the provisions of Section 17 (2) of the Act (49 U. S. C. 17 (2)) for the purpose of taking initial action in the investigation and suspension of rates within the provisions of Section 15 (7) of the Act (49 U. S. C. 15 (7)).

[4] At this point, the proceeding before the Commission was styled *Carbon Black—Southwest to U. S. A. and Canada*, Investigation and Suspension Docket No. 6476.

portation of carbon black) on November 23, 1955, one day before the rate schedules were to go into effect under the terms of the challenged November 14 order.[5] The complaint sought, *inter alia*, a temporary restraining order against the November 14 order for the purpose of preventing the rate schedules from going into effect. On the same day, District Judge Atwell denied the request for a temporary restraining order. On November 24, 1955, pursuant to the Commission's November 14 order, the rate schedules in issue went into effect.

On December 12, 1955, the parties were heard before the three-judge court on appellees' application for an interlocutory injunction. On January 23, 1956, the court filed its opinion (Appendix A, *infra*, pp. 19–37), and on January 24, 1956, entered its judgment (Appendix B, *infra*, pp. 37–42). The judgment granted a final injunction setting aside the Commission's November 14 order, remanding the matter to the Commission for further proceedings not inconsistent with the court's opinion, and prohibiting further use of the new rates. On February 21, 1956, the court denied appellants' motion for new trial.

THE QUESTIONS ARE SUBSTANTIAL

The unusual importance of the questions involved in this appeal can be appreciated only in the practical context of the rate-suspension procedure.

[5] In accord with 28 U. S. C. 2322, the United States was named as the defendant. Under 28 U. S. C. 2323, the Commission and the rail carriers involved duly intervened. The rail carriers have taken a separate appeal from the decision below. No. 125, *Arkansas & Louisiana Missouri Railway Co., et al.* v. *Amarillo-Borger Express, Inc., et al.*

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The Interstate Commerce Act contemplates that most railroad rates will be established on the carriers' initiative by filing new tariffs with the Commission and publishing them in accordance with Section 6. Prior to 1910, the Commission could not, either upon a complaint filed under Section 13 or upon its own motion, prevent such carrier-initiated rates from becoming effective. Only after a full hearing could the Commission set aside such rates. See *Skinner & Eddy Corp* v. *United States*, 249 U. S. 557, 564–565.

Beginning with the Mann-Elkins Act of 1910, Congress has empowered the Commission to suspend railroad-initiated rates, before they become effective, for a specified period pending investigation by the Commission. Under the present law, the Commission may suspend such rates for a period not exceeding seven months. At the end of that period, the railroad may put the proposed rates into effect even though the Commission's investigation has not been completed. In any event, the Commission does not make a final decision as to the lawfulness of proposed rates until it completes its formal hearing procedure.

Thus, Section 15 (7) provides that where new rates have been filed with the Commission:

> the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect;

> and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period * * *.

Section 15 (7) does not specify the circumstances in which the Commission is to suspend or not to suspend. The only stated condition is, in the event of a decision to suspend, "filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of [the Commission's] reasons for such suspension."

Under Section 6 (3) of the Act, railroads must give to the Commission and to the public 30 days' notice of proposed rate changes, unless the Commission permits such changes upon shorter notice. Parties desiring to challenge the lawfulness of the proposed rates must file their protests and requests for suspension at least 12 days prior to the effective date of the intended rate changes. 49 C. F. R. 1.42. The matter is thereafter considered by the Board of Suspension, which consists of a board of five employees of the Commission established pursuant to Section 17 (2) of the Interstate Commerce Act, 49 U. S. C. 17 (2), for the purpose of taking initial action.

Indicative of the informality of suspension proceedings are the Commission's rules dealing with the content of protests and the special rules of practice before the Board of Suspension. Rule 42 of the Commission's General Rules of Practice, 49 C. F. R. 1.42, merely requires that the protest should identify the publishing carrier, the tariff and schedules, and specific items protested, and "should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution."[6] The rule provides that no protest shall include a prayer that it be considered a formal complaint. If the protestant intends to proceed further against a tariff which has not been suspended, then a formal complaint or petition must be filed.

The special rules of practice governing the procedure of the Board of Suspension, 49 C. F. R. 1.200, state in part: "The proceedings of the Board of Suspension * * * shall be informal. No transcription of such proceedings will be made. Subpoenas will not be issued and, except when applications or petitions are required to be attested [in the case of 4th Section applications], oaths will not be administered." These rules also set out the procedure for obtaining review of actions of the Suspension Board where it fails to suspend rates. Petitions may be filed with the Commission for reconsideration by the designated appellate division—*i. e.*, Division 2

[6] Even telegraphic protests may be filed in the event of an emergency, provided the protestant then submits a pleading complying with the above requirements.

(20 F. R. 1465). Petitions must be filed at least two days prior to the effective date of the tariff.

The reason for such informality—apart from the fact that suspension proceedings represent but a preliminary step in the investigation of proposed rates—is apparent from the number of suspension cases handled annually by the Commission. During the period November 1, 1954, to November 1, 1955, nearly 5,000 requests for suspension were filed against 4,000 rate adjustments. 69th Annual Report of the Commission, pages 101–102. This number becomes even more significant in view of the speed required in disposing of suspension cases. As the procedure outlined above makes clear, the 30-day period of notice is commonly narrowed down to 12 days in which the Commission must decide whether to suspend or not to suspend rates, and to two days in which the appellate division must decide whether to affirm or reverse the board's ruling. This necessity for acting expeditiously makes it impossible to cloak these proceedings with any degree of the formality that characterizes, for example, the subsequent hearing "on the merits" of the complaint against the new rate schedules.

1. The court below apparently concedes that historically the Commission's exercise of its rate suspension powers was not subject to judicial review.[7] However,

[7] See *Board of Commissioners* v. *Great Northern R. Co.*, 281 U. S. 412, 429; *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S. D. Ga. 1916), affirmed, 239 Fed. 718 (C. A. 5 1917); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495 (E. D. Va. 1935) (3-judge court); *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998, 1000 (S. D. N. Y. 1936);

it found reviewability in the following provisions of Section 10 of the Administrative Procedure Act:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

From these provisions and their ambiguous legislative history,[8] the court concluded that "the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001 (f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act." 138 F. Supp. 411, 418. We contend that in so holding the District Court misread Section 10 and misconceived the nature of the suspension procedure.

It is settled that Section 10 did not scrap every rule devised by Congress and the courts for the judicial review of administrative action. *Heikkila* v. *Barber*, 345 U. S. 229; *Blackmar* v. *Guerre*, 342 U. S. 512.

Manhattan Transit Co. v. *United States*, 24 F. Supp. 174, 177 (D. Mass. 1938) (3-judge court); *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y. 1952) (3-judge court); *National Water Carriers Ass'n.* v. *United States*, 126 F. Supp. 87, 90-91 (S. D. N. Y. 1954) (3-judge court). See also opinion of Judge Davidson in *Ferguson-Steere Motor Co.* v. *United States*, 126 F. Supp. 588, 592 (N. D. Texas 1954) (3-judge court). A statement in Judge Hutcheson's opinion in *Ferguson-Steere*, *supra*, at 591, apparently constitutes the only judicial expression to the contrary.

[8] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 483.

Specifically, as to what administrative actions are reviewable by the courts, the general provisions of Section 10 are reconciled with other legal rules by its introductory clause, which qualifies all of Section 10: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— * * *." *Heikkila* v. *Barber, supra.*

Section 15 (7) of the Interstate Commerce Act, providing that the Commission "*may* from time to time suspend the operation" of proposed rates, suggests on its face that the exercise of the suspension power is "agency action by law committed to agency discretion," and thus exempt from judicial review under Section 10 of the Administrative Procedure Act. Such a reading merely reiterates this Court's observation in *Board of Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412, 429, that "This power of suspension was entrusted to the Commission only." It is also in accord with an unbroken line of lower federal court decisions both before and after enactment of the Administrative Procedure Act.[9]

In the instant case, where such review is not required by the Constitution, the purpose of Congress is controlling and that purpose, unless stated expressly, is to be gathered from the kind of administrative action, the procedure from which it ensues, and consequences of such action. Cf. *Stark* v. *Wickard,* 321 U. S. 288. From such a context, it may appear that Congress intended to vest in an agency an unreviewable discretionary power to act or not to act upon certain matters. *United States* v. *George S.*

[9] See note 7, *supra.*

Bush & Co., 310 U. S. 371; *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; Davis, *Administrative Law* (1951), pp. 842–850. In such cases, the introductory clause of Section 10 insulates that purpose from its general provisions.

As noted above, the exercise of the suspension power conferred by Section 15 (7) is merely a preliminary step in the determination of whether proposed rates are lawful. From the nature of the rate-making procedure prescribed by the Interstate Commerce Act, the Commission's determination to suspend or not to suspend proposed rates (or to vacate a suspension previously ordered) represents a tentative and informal conclusion as to the probable lawfulness of such rates. Such determinations are made rapidly, upon informal and often incomplete presentations, and in large numbers. To a unique extent, such determinations are based so much upon experience, rather than upon a record in the conventional sense, that judicial review is inappropriate. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

While the decision below deals immediately with an order of the Commission vacating its prior suspension order, its rationale appears to be equally applicable to orders originally suspending or refusing to suspend rates. As already noted, approximately 5,000 requests for suspension action are filed each year. Under the District Court's holding, the Commission's disposition of each request is presumably subject to judicial review.[10] Moreover, the chronology of the in-

[10] Following shortly upon the heels of the decision below, two suits substantially similar to the instant case were filed challenging Commission orders vacating prior orders of suspension.

stant case shows that such review is ordinarily impracticable unless the courts assume, as the court below did, the further power to set aside rates which have already become effective. The result would be serious disruption of long-established rate-making mechanisms. Cf. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 689, 691.

2. Even assuming reviewability of the Commission's order of November 14, 1955, the court below erred in setting aside that order on the ground that it was not accompanied by sufficient findings.

The Commission's suspension order of September 23, 1955, stated in part:

> * * * there is reason to believe that they [the proposed rate schedules] would, if permitted to become effective, result in rates and charges, * * * which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; * * *.

This order, suspending the proposed rail rates, was vacated by the Commission's order of November 14, which contained the following statement:

Dixie Carriers, Inc. v. *United States of America*, Civil Action No. CA-9544, U. S. D. C. S. D. of Texas, Houston Division; *Long Island Railroad Co.* v. *United States of America*, Civil Action No. 16321, U. S. D. C. E. D. N. Y. The first suit, arising in the Fifth Circuit as did the instant case, was argued on May 18, 1956. No opinion has come down at this writing. On the other hand, the three-judge court in the *Long Island* case rendered its opinion (as yet unreported) on May 9, 1956. Circuit Judge Swan dissenting, the court followed the decision below in setting aside the Commission order under review.

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> *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

The District Court held that the last quoted statement was legally insufficient to support a vacation of the prior suspension.

At the outset, it should be noted that Section 15 (7) only requires the Commission to state reasons when it suspends rates; it does not require reasons when the Commission refuses to suspend or vacates a previous suspension.[11] Nevertheless, in the instant case, the District Court concluded that a more detailed statement of reasons was necessary.

In so holding, the court placed heavy reliance upon Section 8 (b) of the Administrative Procedure Act, which requires full and formal findings of fact and conclusions of law. However, Section 8 applies, by its express terms, only "In cases in which a hearing is required to be conducted in conformity with section 7" of the Administrative Procedure Act. And this Court has recently so held. *American Trucking Assns.* v. *United States,* 344 U. S. 298, 319–320. Since the Interstate Commerce Act does not require a hear-

[11] That a vacation of a prior suspension order may often be the equivalent of an initial refusal to suspend, is suggested by the chronology of this case. Here, the proposed rates were to become effective on September 24; the Board of Suspension refused to suspend on September 22; on appeal, Division 2 suspended the rates on September 23. It seems likely, in this and many other cases with a similar chronology, that the Division has opportunity to make a considered judgment only after its initial action to suspend.

ing in suspension cases—and certainly not "a hearing * * * in conformity with section 7," the requirements of Section 8 (b) of the Administrative Procedure Act are wholly inapplicable here.

The court below also relied on "the general law concerning the sufficiency of Commission action." 138 F. Supp. at 419. According to the court, "administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements." 138 F. Supp. at 417. But this proposition, although of course true as applied to formal proceedings, rests on the assumption that the challenged administrative action is subject to judicial review; if there is no judicial review, obviously there is no need to make findings to facilitate judicial review. And, as we have argued *supra*, the Commission order challenged in this case is not subject to judicial review. In this regard, it is significant that each of the decisions cited in the opinion below (138 F. Supp. at 417) as to "the general law concerning the sufficiency of Commission action" involved formal proceedings in which the requirement of making findings was unquestioned and the issue was instead the adequacy of those findings. *E. g., State of Florida* v. *United States, et al.*, 282 U. S. 194; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80.

Practical considerations further illustrate the error in this aspect of the decision below. The holding of the District Court, that the Commission's suspension actions must be accompanied by a statement of

reasons in the nature of findings, would impair seriously the effectiveness of the suspension procedure. Applied to 5,000 suspension proceedings annually, it would create a heavy burden in the drafting of such reasons or findings, a burden entirely out of proportion to the tentative character of the Commission's decisions in suspension matters. It is entirely possible that the imposition of such a burden in the limited time available for suspension action would force the Commission to make a more sparing use of the suspension power. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 689.

3. The decision below establishes the further precedent of invalidating rates which have already gone into effect and requiring the observance of rates which have been previously cancelled. After denying the temporary restraining order sought by the appellees and thus permitting the new rate schedules to go into effect,[12] the District Court enjoined their continued operation even while the Commission was investigating their lawfulness under Section 15 (1) of the Interstate Commerce Act.

In essence, the District Court undertook the making of rates which has been recognized universally as being beyond the scope of judicial power. *Peik* v. *Chicago N. W. R. Co.*, 94 U. S. 164; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *Simpson* v. *Shepard* (Min-

[12] The appellees were aware of this problem. In their complaint, in connection with their unsuccessful request for a temporary restraining order, they alleged: "Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules."

nesota Rate Cases), 230 U. S. 352; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298; *Loomis* v. *Lehigh Valley R. Co.,* 240 U. S. 43; *Terminal R. Assn.* v. *United States,* 266 U. S. 17; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 221; cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 144. Indeed, the court assumed a power that not even the Commission, the agency charged by Congress with the function of rate regulation, possesses—namely, the power to suspend rates after they had gone into effect but prior to a final decision on their lawfulness. If the decision below is permitted to stand, none of the thousands of carrier made rates which become effective each year following the Commission's refusal to suspend could be relied upon as legal charges until they had been judicially tested or until the expiration of the seven month suspension period.

The instant case well illustrates one of the dangers implicit in such a far-reaching doctrine. The District Court's judgment, entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "void ab initio". The result of this judgment is that for over nine weeks the intervening railroads have been collecting freight charges below the "legal" rate and that these railroads are now obligated under the Elkins Act, 49 U. S. C. 41 *et seq.,* to collect from their shippers the undercharges—that is, the difference between the charges actually paid and the higher rate previously in force—even though the Commission has never determined that the rates are unlawful. Whether the court had such jurisdiction is, we submit, a question which should be determined by this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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JULY 1956.

APPENDIXES

Appendix A

In the District Court of the United States for the Northern District of Texas, Dallas Division

Civil Action No. 6289

Amarillo-Borger Express, Inc., et al.

v.

United States of America

Before Brown, Circuit Judge, Atwell and Estes, District Judges

Brown, *Circuit Judge:*

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Commerce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive

[1] The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325.

natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the complainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules,

the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U. S. C. A. 15 (7), for suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the effect of which is to freeze

[2] After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

[3] Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference hearing September 21, 1955, the Suspension Board [4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order [5] states:

> *And it further appearing*, That upon consideration of the said schedules and protests thereto there is reason to believe that they

[4] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U. S. C. A. 17 (2), § 7.3, 20 FR 5031-5035, July 14, 1955.

[5] Investigation and suspension docket No. 6476 Carbon Black—Southwest to U. S. A. & Canada

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign

would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2 vacated [6] its prior order of suspension.

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commerce, to become effective September 24, 1955, and later, designated as follows:"

[Railroad tariffs are described]

[then follows paragraph quoted in text above]

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

[6] "*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

The only "finding" by the Commission[7] was:

> *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the granting or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are powerless to sus-

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[7] By Order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8] While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

[9] The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to

pend the rail schedules which have thus become effective or reinstate the prior rates.

As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judgment, at this time, upon the intrinsic

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complain of Commission action, *Alton R. Co.* v. *United States*, 315 U. S. 15, 86 L. Ed. 586; *Chicago St. P. M. & O. Ry. Co.* v. *United States* (D. C. Minn.), 50 Fed. Supp. 249, affd. 322 U. S. 1, 88 L. Ed. 1093; cf. *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 84 L. Ed. 869; *Interstate Com. Com.* v. *Oregon-Wash. R. Co.*, 288 U. S. 14, 25, 77 L. Ed. 588, 596; *American President Lines* v. *Federal Maritime Board* (D. C. D. C.), 112 Fed. Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law", § 1009 (e), Administrative Procedure Act, 5 U. S. C. A. 1001 et seq, it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counteraffidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower, inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they [rates] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the * * * act and con-

[10] The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: *Carlsen* v. *United States* (S. D. N. Y.) (three-judge), 107 Fed. Supp. 398; *Algoma Coal & Coke Company et al.* v. *United States* (D. C. Va., 1935) (three-judge), 11 Fed. Supp. 487; *M. C. Kiser Co.* v. *Central of Georgia Railway* (D. C. Ga.), 236 Fed. 573, affd. 5 Cir., 239 Fed. 718; *Manhattan Transit Co., Inc.* v. *United States* (D. C. Mass.) (three-Judge), 24 Fed. Supp. 174; *National Water Carriers Association* v. *United States* (S. D. N. Y.) (three-Judge), 126 Fed. Supp. 87; *Merchants Truckmen's Bureau* v. *United States* (S. D. N. Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, *Ferguson-Steere Motor Co.* v. *United States* (N. D. Tex. 1954) (three-Judge), 126 Fed. Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

stitute unfair and destructive competitive practices in contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual [11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through specific citation in the briefs before us, to accord to Commission action a presumption of legality, *United States* v. *Chemical Foundation,* 272 U. S. 1, 14, 15; *Baltimore and Ohio R. Co.* v. *United States,* 298 U. S.

[11] The first is in § 15 (7) of the Interstate Commerce Act, 49 U. S. C. A. 15 (7):

"Whenever there shall be filed with tht commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * * At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." [Emphasis supplied.]

The second is in the Administrative Procedure Act, § 8, 49 U. S. C. A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." [Emphasis supplied.]

349, 358, 360; *Federal Power Commission* v. *Hope National Gas Co.*, 320 U. S. 591, 602, we think that all parties were entitled to take his for its face value as a deliberate, responsible, articulate finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor." [12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge

[12] The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents (railroads and some shippers) requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be a good ground; nor, as contended by Complainants, do we think that the Commission meant that.

whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the basic or essential findings required to support the Commission's order," *State of Florida* v. *United States,* 282 U. S. 194, 215, 75 L. Ed. 291; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S 454, 465, 79 L. Ed. 587; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 224, 95 L. Ed. 25; *Cantlay & Tanzola* v. *United States* (S. D. Calif.) (three-Judge), 115 Fed. Supp. 72; *North Carolina* v. *United States,* 325 U. S. 507, 89 L. Ed. 1760; *Atlanta and St. Andrews Bay Railway Co.* v. *United States,* 104 Fed. Supp. 193; *Pacific Inland Tariff Bureau* v. *United States,* 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U. S. C. A. 1007 (b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under *Riss and Co., Inc.* v. *United States,* 341 U. S. 907, 95 L. Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> § 1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof.

Starting with *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.,* 281

U. S. 412, which, describing the statutory background of present Section 15 (7) concerning suspensions, states, "This power of suspension was entrusted to the Commision only", and relying heavily on *Carlsen, Algoma Coal, Kiser, Manhattan Transit Co.,* and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U. S. C. A. 1001 (f), upon the basis of administrative expertise, are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act.[11]

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[11] The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"SEC. 10. (now § 1009) Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved*

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we

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matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committee on the Judiciary, House of Representatives (House Report No. 1980), page 275, 276:

"Section 10. * * * (heading same as Senate Committee Report)

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

"* * * (Here follows first paragraph of Senate Committee Report quoted above) The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its

think it evident that the order of vacation did not satisfy these requirements. This order vacating the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing," the prior action is rescinded. If it is read as though it were meant to be a repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this

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face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, page 310, 311:

"Mr. McCarran. I yield.

"Mr. Donnell. I should like to ask the distinguished Senator a question. Section 10 (now 5 U. S. C. A. 1009) of the bill recites in part that—

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to de-

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran. Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * *

"Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

termine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hastly, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing", determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U. S. C. A. 13. But under the statutory scheme of Section 15 (7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the

benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56; *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, *Standard* v. *Olson,* May 22, 1954, 98 L. Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections

[14] The provision in § 15 (7), footnote 11, supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

6 (3), 15 (1) and 15 (7) of the Act, 49 U. S. C. A. 6 (3), 15 (1), 15 (7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. *Skinner and Eddy Corp.* v. *United States*, 249 U. S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff [15] rates and schedules which be-

[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

came, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

JUDGMENT FOR PLAINTIFF. REMANDED TO THE COMMISSION.

APPENDIX B

In the District Court of the United States for the northern district of Texas, Dallas division

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL.

v.

UNITED STATES OF AMERICA

JUDGMENT

BE IT REMEMBERED, that on December 12, 1955, in the above entitled and numbered cause wherein AMARILLO-BORGER EXPRESS, INC.; BEST MOTOR FREIGHT; KNAUS TRUCK LINE, INC.; LEEWAY MOTOR FREIGHT, INC.; MERCHANT'S FAST MOTOR LINES, INC.; STRICKLAND TRANSPORTATION COMPANY, INC.; SUNSET MOTOR LINES, INC.; and YELLOW TRANSIT FREIGHT LINES, INC., are Complainants; the UNITED STATES OF AMERICA is Defendant; and the Interstate Commerce Commission is intervenor on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads

whose names are listed in Appendix "A" of this judgment, are likewise intervenors on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commisison, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black-Southwest to U. S. A. & Canada. *It appearing,* That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It*

is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. HAROLD D. McCOY, *Secretary.* [SEAL]"

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111–J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955, (to the extent that they publish rates suspended by the order of September 23, 1955) be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

RENDERED AND ENTERED in open Court this 24th day of January 1956.

s/ WM. H. ATWELL,
United States District Judge.

Approved for entry:

s/ RALPH W. CURRIE,
Attorney for Complaints.

s/ JOHN C. FORD,
Attorney for United States of America.

s/ BERNARD ENGLISH,
Attorney for Interstate Commerce Commission.

s/ WM. R. MCDOWELL,
Attorney for Southwestern Railroads.

APPENDIX A [to Judgment]

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
Panhandle and Santa Fe Railway Company.
Chicago, Rock Island and Pacific Railroad Company.
The Colorado and Southern Railway Company.
Fort Worth and Denver City Railway Company.
Illinois Central Railroad Company.
The Kansas City Southern Railway Company.
Louisiana & Arkansas Railway Company.
The Arkansas Western Railway Company.
Fort Smith and Van Buren Railway Company.
Midland Valley Railroad Company.
Kansas, Oklahoma & Gulf Railway Company.

Oklahoma City-Ada-Atoka Railway Company.
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Beaver, Meade and Englewood Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).
Asherton and Gulf Railway Company
(Guy A. Thompson, Trustee).
Asphalt Belt Railway Company
(Guy A. Thompson, Trustee).
The Beaumont, Sour Lake & Western Railway Company
(Guy A. Thompson, Trustee).
Doniphan, Kensett & Searcy Railway.
Houston and Brazos Valley Railroad Company
(Guy A. Thompson, Trustee).
International-Great Northern Railroad Company
(Guy A. Thompson, Trustee).
Natches & Southern Railway Company
(Guy A. Thompson, Trustee).
New Iberia & Northern Railroad Company
(Guy A. Thompson, Trustee).
New Orleans and Lower Coast Railroad Company.
New Orleans, Texas & Mexico Railway Company
(Guy A. Thompson, Trustee).
The Orange & Northwestern Railroad Company.
(Guy A. Thompson, Trustee).
Rio Grande City Railway Company
(Guy A. Thompson, Trustee).
The St. Louis, Brownsville and Mexico Railway Company.
(Guy A. Thompson, Trustee).
San Antonio Southern Railway Company
(Guy A. Thompson, Trustee).

San Antonio, Uvalde & Gulf Railroad Company.
(Guy A. Thompson, Trustee).
San Benito and Rio Grande Valley Railway Company.
(Guy A. Thompson, Trustee).
Sugar Land Railway Company
(Guy A. Thompson, Trustee).
St. Louis Southwestern Railway Company.
St. Louis-San Francisco Railway Company.
St. Louis, San Francisco and Texas Railway Company.
Quanah, Acme & Pacific Railway Company.
Southern Pacific Company.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Abilene & Southern Railway Company.
The Denison and Pacific Suburban Railway Company.
Texas-New Mexico Railway Company.
Texas Short Line Railway Company.
The Weatherford, Mineral Wells and Northwestern Railway Company.
The Texas Mexican Railway Company.

Appendix C

Corrected Order

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 23rd day of September, A. D., 1955

Investigation and Suspension Docket No. 6477

CARBON BLACK—SOUTHWEST TO COLORADO

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules set-

ting forth new reduced rates and charges and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, designated as follows:

F. C. KRATZMIER, Agent:

SUPPLEMENTS 28 and 31 to I. C. C. 4136:

On pages 2 and 3 thereof, respectively, in ITEM 1270–B the reference to column "C" and on pages 2, 3 and 4 and 3, 4 and 5 thereof, respectively in Items 1280–B to 1336–B inclusive, the rates in the columns captioned "C";

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and

issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Division 2.

[SEAL] HAROLD D. MCCOY, *Secretary*.

APPENDIX D

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, DIVISION 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955

Investigation and Suspension Docket No. 6476

CARBON BLACK—SOUTHWEST TO U. S. A. & CANADA

It appearing, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

It further appearing, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

It is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, Division 2, acting as an appellate division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX E

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are as follows:

SEC. 6 (3)

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the re-

quirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

SEC. 13 (1)

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the mat-

ters complained of in such manner and by such means as it shall deem proper.

SEC. 15 (7)

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate

account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1 *et seq.*, are as follows:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions)

shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10. * * *

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.